



DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 11

[Docket No. APHIS-2011-0009]

RIN 0579-AE76

Horse Protection; Licensing of Designated Qualified Persons and Other Amendments

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is proposing to withdraw a final rule that was filed for public inspection by the Office of the Federal Register on January 19, 2017, in advance of publication, and that amends the Agency's Horse Protection Act regulations (the 2017 HPA final rule). On January 23, 2017, APHIS withdrew the 2017 HPA final rule from publication without undertaking notice and comment procedures, in accordance with a memorandum that was issued by the Executive Office of the President on January 20, 2017. However, following a lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit found this withdrawal to be deficient. The District Court has indicated that one way to remedy this deficiency is to undertake notice and comment procedures on the proposed withdrawal. APHIS is therefore proposing to withdraw the 2017 HPA final rule, and take public comment on this matter.

DATES: We will consider all comments that we receive on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to www.regulations.gov. Enter APHIS-2011-0009 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2011-0009, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at www.regulations.gov or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Aaron Rhyner, DVM, Assistant Director, USDA-APHIS-Animal Care, 2150 Centre Ave., Building B, Mailstop 3W11, Fort Collins, CO 80526-8117; aaron.a.rhyner@usda.gov; (970) 494-7484.

SUPPLEMENTARY INFORMATION:

Under the Horse Protection Act (HPA, or the Act, 15 U.S.C. 1821 *et seq.*), the Secretary of Agriculture is authorized to promulgate regulations to prohibit the movement, showing, exhibition, or sale of sore horses.

The Secretary has delegated responsibility for administering the Act to the Administrator of the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the Act has been delegated to the Deputy Administrator for Animal Care. Regulations and standards established under the Act are contained in 9 CFR part 11 (referred to below as the regulations), and 9 CFR part 12 lists the rules of practice governing administrative proceedings.¹

On July 26, 2016, APHIS published in the *Federal Register* (81 FR 49112-49137, Docket No. APHIS-2011-0009) a proposal² to amend the regulations. Primarily, APHIS proposed to

¹ To view the regulations, go to <https://www.ecfr.gov/current/title-9/chapter-I/subchapter-A/part-11>.

² To view the 2016 proposed rule, its supporting documents, and the comments that we received, go to <https://www.regulations.gov/docket/APHIS-2011-0009>.

discontinue third-party training and oversight of Designated Qualified Persons, or DQPs, who inspect regulated horses for evidence of soring. Instead, we proposed all inspectors would have to be trained and licensed by APHIS. The rule also proposed several changes to the requirements that pertain to the management of horse shows, exhibitions, sales, and auctions, as well as changes to the list of devices, equipment, substances, and practices that are prohibited to prevent the soring of horses. Finally, we proposed to revise the inspection procedures that inspectors are required to perform.

We solicited public comments on the proposal and received 130,975 submissions, as well as comments provided at 5 listening sessions. After APHIS reviewed the comments, on January 11, 2017, we submitted a final rule to the Office of the Federal Register (OFR) for publication (the 2017 HPA final rule).³ That rule was filed for public inspection, in advance of publication, on January 19, 2017. However, on January 20, 2017, the Chief of Staff of the President issued a memorandum instructing Federal agencies to immediately withdraw all regulations awaiting publication at the OFR.⁴ In response to the memorandum, the 2017 HPA final rule, which was on public inspection (and available on the *Federal Register* website, www.federalregister.gov), was withdrawn from publication by USDA on January 23, 2017, the first business day following January 20, 2017.

In August 2019, the Humane Society of the United States (HSUS) and other non-governmental organizations sued USDA. HSUS argued that the 2017 HPA final rule had been duly promulgated and could not be withdrawn without first providing public notice in the *Federal Register* and an opportunity for public comment.

³ We are making a copy of the 2017 HPA final rule available as a supporting document for this proposed withdrawal. To obtain a copy, go to www.regulations.gov, and enter APHIS-2011-0009 in the Search field, or contact the person listed under FOR FURTHER INFORMATION CONTACT.

⁴ To view the memorandum, go to <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>.

On July 22, 2022, the Court of Appeals for the D.C. Circuit reversed and remanded a lower court decision granting USDA's motion to dismiss, holding that "an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published in the Federal Register." *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 41 F.4th 564, 565 (D.C. Cir. 2022). In remanding the case to the lower court, the Court of Appeals clarified that "[o]n remand, the district court may consider all remedial issues, including the question of whether remand to the agency without vacatur is appropriate under the criteria established by Circuit precedent." 54 F.4th 733, 734.

On May 12, 2023, the District Court issued its decision on remand. *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, No. 19-cv-2458 BAH, 2023 WL 3433970 (D.D.C. May 12, 2023). The Court remanded the withdrawal of the 2017 HPA final rule to APHIS without vacatur, but ordered that the withdrawal of the 2017 HPA final rule would be vacated in 120 days if the agency failed to take appropriate remedial action before then. The Court indicated that USDA could attempt to promulgate a new HPA rule or "remedy the deficiency in the withdrawal of [the 2017 HPA final rule] by conducting notice and comment on the withdrawal." 2023 WL 3433970, at *14. On May 23, 2023, APHIS requested that the Court extend the deadline for action from 120 days to 180 days and the court granted that request on June 1, 2023.

APHIS will not be able to promulgate a new HPA rule within 6 months. Executive orders and USDA Departmental guidance regarding the regulatory process impose procedural steps for that new rule, including the preparation of supporting documentation, that USDA estimates will take materially longer to complete. Moreover, for the other reasons described below, APHIS has opted to engage in notice and comment rulemaking on the withdrawal.

In a document⁵ published in the *Federal Register* on December 13, 2021 (86 FR 70755; Docket No. APHIS-2011-0009) (the 2021 withdrawal), APHIS withdrew the July 26, 2016

⁵ To view the withdrawal, go to <https://www.regulations.gov/document/APHIS-2011-0009-11188>.

proposed rule on which the 2017 HPA final rule was based. In that 2021 withdrawal, we articulated our reasons for withdrawing the proposed rule. Those reasons remain relevant for our now proposing to withdraw the 2017 HPA final rule.

In the 2021 withdrawal, we stated that the National Academy of Sciences (NAS) reviewed methods for detecting soreness in horses and published a report of their findings in 2021.⁶ The report examined the inspection methods that DQPs use for identifying soreness in walking horses, new and emerging approaches for detecting pain, and use of the scar rule in determining compliance with the HPA, and made a number of science-based recommendations regarding revisions to APHIS' HPA program and associated regulations. We stated that we had reviewed the July 26, 2016 proposed rule in light of the NAS report, and determined that the proposed rule did not sufficiently address the report's findings.

We also stated that, because 5 years had elapsed since the issuance of the proposed rule, the underlying data and analyses that supported the proposed rule likely need to be updated.

Additionally, we stated that it was our intent to issue a new proposed rule that would incorporate more recent findings and recommendations, including the NAS report.

The above reasons are relevant in 2023 and, indeed, have become even more pronounced. A draft of the new proposed HPA rule was accepted by the Office of Management and Budget on September 2, 2022, and is currently under review. The 2017 HPA final rule did not provide for inspection of horses by APHIS employees as an alternative to inspection by third-party inspectors who have to be trained and licensed by APHIS, despite concerns from commenters that inspectors that meet APHIS' criteria could be prohibitively expensive for small shows. It is APHIS' intent, as stated in the Spring 2023 Unified Regulatory Agenda, to make such allowance in the new proposed rule.

⁶ *A Review of Methods for Detecting Soreness in Horses*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25949>.

Therefore, consistent with the 2021 withdrawal of the July 2016 proposed rule, we are proposing also to withdraw the 2017 HPA final rule to avoid regulatory whiplash – i.e., allowing a new (yet outdated) regulation to go into effect that would be subject to change, within a short period of time, by yet another rulemaking. Maintaining the status quo while going forward with the new proposed HPA rule will avoid regulatory confusion for both the industry and the public. Additionally, allocating resources towards implementing regulations that were developed without the benefit of consideration of the recent NAS report’s findings, as well as recent inspection data, would hamper APHIS’ current efforts to modernize the horse protection regulations.

Accordingly, we are proposing to withdraw the 2017 HPA final rule, and are requesting public comment on our proposed withdrawal. Comments shall be considered relevant to the proposed withdrawal to the extent that they articulate reasons for or against the withdrawal. To that end, we are making a copy of the 2017 HPA final rule available as a supporting document for this proposed withdrawal (see footnote 3).

Following the comment period, APHIS will publish a subsequent action in the *Federal Register* announcing the Agency’s determination whether or not to withdraw the 2017 HPA final rule based on the comments received.

Executive Orders 12866, 13563, and 14094, and the Regulatory Flexibility Act

This proposed withdrawal has been determined to be significant for the purposes of Executive Order 12866, as amended by Executive Order 14094, and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rulemaking. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also examines the potential economic effects of this rulemaking on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below.

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This proposed withdrawal is an administrative action and is intended to support the withdrawal of the 2017 HPA final rule. This action would not have a significant impact on the affected entities. In the absence of apparent significant economic impacts, we have not identified alternatives that would minimize such impacts. In addition, APHIS is in the process of developing new regulations that would provide protections to the regulated horses. In addition, this new amendments to the Horse Protection regulations would incorporate the findings of a 2021 National Academy of Sciences (NAS) study that examined methods used to inspect horses for soreness. This NAS study was published after the 2017 HPA rule.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Executive Order 13175

This proposed withdrawal has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

We have determined that this action does not have tribal implications, insofar as it would withdraw a final rule that the Agency never implemented or enforced.

Paperwork Reduction Act

This proposed withdrawal contains no reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Done in Washington, DC, this 17th day of July 2023.

Jennifer Moffitt,

Undersecretary, Marketing and Regulatory Programs, USDA.